

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KEVIN H.,

Claimant,

v.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Nos. 2011071025

A Proceeding Under the
Lanterman Developmental Disabilities
Services Act

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in a consolidated hearing in Alhambra on September 1, 2011. Eastern Los Angeles Regional Center (Service Agency) was represented by Carmen Castro Luna, Supervisor of Family Services and Supports. Claimant Kevin H. was represented by his father who was provided with the services of a Vietnamese interpreter.

The Service Agency presented Exhibits 1–15 and the argument of the Family Services and Supports Supervisor. Claimant presented the testimony and argument of the father. The Service Agency's exhibits were admitted into evidence.

Oral and documentary evidence having been received and argument heard, the Administrative Law Judge submitted this matter for decision on September 1, 2011, and finds as follows:

ISSUE

The issue presented for decision is whether claimant should receive more than 252 hours of in-home respite in lieu of out-of-home respite for the month of August 2011.

FACTUAL FINDINGS

1. Claimant Kevin H. was born on December 16, 2006, and is four years old. He has been diagnosed with Autistic Disorder as well as other medical conditions. Based on his diagnosis and developmental delays and/or disabilities, claimant is eligible for and receives regional center services from the Service Agency, including respite, social emotional developmental intervention programming to improve his social and play skills, Discrete Trial Training or intensive behavioral treatment services, and occupational therapy during the summer. Claimant receives special education services and supports in a special day class at his preschool, including speech therapy, occupational therapy, parent counseling, and extended school year services. He receives Supplemental Security Income that helps pay for his daily living expenses and basic needs.

2. Claimant lives with his parents and three siblings in Alhambra. Two of his siblings are also consumers of the Service Agency and one of them has behavioral challenges. His parents are unemployed and spend much of their time and energy caring for claimant and their three children, overseeing their developmental needs, and organizing their regional center and school activities. Claimant is in stable health. He has short bowel syndrome, cholestatic liver disease, and suspected cystic fibrosis. He has a history of feeding difficulties and allergies. He tends to play alone. Claimant is very resistive, has tantrums, cries daily, grabs his mother's hair when upset, and runs out from the house. He has difficulty with transitions and displays self-stimulatory behaviors, including hand flapping.

3. For the past few years, claimant's mother has taken three weeks every August to visit her elderly parents in Ho Chi Minh City in Vietnam. While the mother is overseas in Southeast Asia, claimant's father stays home with claimant and their three other children. The parents have decided that summertime, or August, is the best time for the mother to visit her parents in Vietnam because the children are on summer vacation and not attending school. The parents have found that, during the regular school year, their children are very busy and both of them have to be at home to help their children with their school work and to supervise their various activities.

4. In past years, when claimant's mother has gone to Vietnam, the Service Agency has provided the claimant and family with in-home respite in lieu of out-of-home respite. Out-of-home respite (OHR) services, as defined by the Service Agency's Purchase of Service Guideline, are intermittent or regularly scheduled temporary care provided outside the consumer's home by a vendored service provider. OHR is intended to assist the family in securing temporary outside support in providing appropriate care and supervision of the consumer.

5. Under his IPP dated December 16, 2010, the Service Agency agreed to provide claimant with 30 hours per month of respite services. Her father is the parent vendor of the respite services and is responsible for hiring and training respite workers, keeping respite records, withholding income taxes for the respite workers, and following the Service Agency's vouchered respite regulations. In addition, claimant's IPP provides that he will receive 21 days of OHR. Earlier, the Service Agency had determined to provide 12 hours per day of OHR for each of those 21 days, or 252 hours of OHR, when "both parents are on vacation." However, claimant's father had filed an appeal and requested 16 hours daily or 336 hours of OHR. The Service Agency has allowed claimant to use in-home respite in lieu of OHR.

6. On December 23, 2010, in OAH Case No. 2010080309, claimant's appeal and request to receive 336 hours of OHR was denied on the grounds that claimant's father had not demonstrated a need or justification for the additional OHR hours. Claimant's father had asserted that the additional hours were needed to help him to care for his four children while his wife was away on vacation. The Decision also concluded that claimant did not need the additional OHR hours because he spends four hours per day at school on weekdays. The Decision affirmed the determination of the Service Agency to provide claimant with 252 hours of OHR over the course of 21 days.

7. On March 21, 2011, in OAH Case No. 2010090526, another of claimant's fair hearing requests for additional OHR hours was dismissed on the basis that the issue had been previously decided in Case No. 2010080309.

8. In a Notice of Proposed Action dated July 15, 2011, the Service Agency denied claimant's request for 21 days at 16 hours per day, or 336 hours, of OHR for the period of August 1–21, 2011. Instead, the Service Agency determined to fund or provide 21 days at 12 hours per day, or 252 hours, of OHR. As reasons for its action, the Service Agency cited claimant's receipt of respite each month, the parents' responsibility to provide care and supervision to a minor under 13 years of age, and the requirement that the Service Agency consider whether the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

9. On July 21, 2011, claimant's father filed a Fair Hearing Request, asking that the Service Agency provide 336 hours of OHR for three weeks in August 2011. In his Fair Hearing Request and in the hearing in this matter, claimant's father contended that, two or three years ago, the family received 336 hours of OHR in the summer when his wife left the country to visit her parents. He asserted that the reduction of the OHR hours was a mistake. He testified that 252 hours of OHR are not sufficient because he has four children, three of whom are developmentally disabled, the children argue with each other frequently, and he needs help in the home while his wife is gone because the children are not in school due to summer break.

This summer, his wife went to Vietnam for three or four weeks in August 2011 and returned on August 26, 2011.

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Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

Grounds exist under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to grant claimant's request for more OHR, based on Findings 1 – 9 above.

Under the Lanterman Act, the Legislature has decreed that persons with developmental disabilities have a right to treatment and rehabilitative services and supports in the least restrictive environment and provided in the natural community settings as well as the right to choose their own program planning and implementation. (Welf. & Inst. Code, § 4502.)¹

Services and supports for persons with developmental disabilities means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability or toward the achievement and maintenance of independent, productive, normal lives. (§ 4512, subd. (b).) Services and supports may include physical and occupational therapy, recreation, behavior training, community integration services, daily living skills training, and social skills training. (*Ibid.*)

The Legislature has further declared regional centers are to provide or secure family supports that, in part, respect and support the decision making authority of the family, are flexible and creative in meeting the unique and individual needs of the families as they evolve over time, and build on family strengths and natural supports. (§ 4685, subd. (b).) Services by regional centers must be provided in the most cost-effective and beneficial manner. (§§ 4685, subd. (c)(3), and 4848, subd. (a)(11)) and must be individually tailored to the consumer (§ 4648, subd. (a)(2)).

Further, section 4648, subdivision (a)(8), provides that regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving funds to provide those

¹ Further section references are to the Welfare and Institutions Code unless indicated otherwise.

services. Section 4659, subdivision (a)(1), directs regional centers to identify and pursue all possible sources of funding for consumers receiving regional center services.

Effective on September 1, 2008, section 4646.4, subdivision (a), requires regional centers, when purchasing services and supports, to ensure conformance with purchase of service policies and to utilize generic services and supports when appropriate. Regional centers are required to take into account the consumer's need for extraordinary care, services, and supports and supervision. Services and supports for persons with developmental disabilities includes respite which may be included in a consumer's IPP. (§ 4512, subd. (b).)

In-home respite services are intermittent or regularly scheduled temporary non-medical care and supervision provided for a regional center client in his or her own home and who resides with a family member. (§ 4690.2, subd. (a).) Respite care is designed to assist family members in maintaining the client at home, provide appropriate care and supervision to ensure the client's safety in the absence of family members, relieve family members from the constantly demanding responsibility of caring for the client, and attend to the client's basic self-help needs and other activities of daily living, including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members. (§ 4690.2, subd. (a)(1 - 4).)

Effective July 1, 2009, a regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities. (§ 4686.5, subd. (a)(1).) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year for a consumer. (§ 4686.5, subd. (a)(2).) A regional center may grant an exemption to this limit of 21 days if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer (§ 4686.5, subd. (a)(3).)

Under the Service Agency's Purchase of Service (POS) Guideline for Out-of-Home Respite Services, dated May 2, 2011, a consumer who resides with a family member is eligible for OHR when the occasional needs of the consumer and/or family are more than the support of friends and natural and community supports can provide and may be used as a support option should family members have planned activities such as a vacation. OHR may be provided to a consumer and the family when the care and supervision needs of the consumer exceed that of an individual of the same age without developmental disabilities. In-home respite in lieu of OHR may be used only when there is no out-of-home respite arrangement available.

The POS Guideline further provides that the Service Agency may not purchase more than 21 days of OHR in a fiscal year. The Service Agency may grant an exemption to this limit if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer. Within the limit of 21 days, the daily amount of OHR is calculated on individual needs and cannot exceed 16 hours per day. Hours are calculated by taking into account the amount of time that the consumer attends school or day programs during the day, after school care, social and recreational programs, and hours of sleep, for respite hours cannot be provided during these times. The effectiveness of OHR is to be determined by feedback from the family or the consumer and an assessment of the progress towards meeting objectives of the consumer's IPP. OHR is a service that must be included in a consumer's IPP.

Because claimant has been receiving in-home respite in lieu OHR from the Service Agency and the Service Agency has proposed to provide him with OHR again this year, claimant is deemed eligible for OHR under the Lanterman Act and the Service Agency's Purchase of Service Guideline. Two or three years ago, claimant and his family received 336 hours of OHR when his mother was out of the country for approximately three weeks in the summer. Last year, the Service Agency provided 252 hours of OHR pursuant to a Decision in Case No. 2010080309. This year, on July 15, 2011, the Service Agency denied the funding 336 hours and agreed to provide 252 hours of OHR again. Claimant requests 336 hours of OHR in this appeal.

Here, claimant bears the burden of showing that he should receive what is the maximum allowable number of OHR hours under the Lanterman Act and the Service Agency's POS Guideline. The Service Agency, on the other hand, still has the burden of demonstrating that its decision to provide 252 hours of OHR was appropriate based on the law and regulations and the needs of the consumer.

Claimant has shown that he needs more than 252 hours of OHR. Besides claimant, the family has two other children who are consumers of the Service Agency as well as a fourth young child. Claimant presents with medical conditions, feeding difficulties, and behavioral issues. Last year or so, the Service Agency reduced claimant's OHR hours from 336 to 252 hours which decision was affirmed following a fair hearing. However, the Decision in that matter determined that claimant was in school four days each week and did not need more OHR hours. While he has extended school services, claimant established that he and his siblings were not in school during the month of August 2011 when their mother visited the grandparents in Vietnam and claimant's father used the OHR hours to hire respite workers. Claimant's mother chooses to visit her parents in August when the children are on summer break because the parents have found that their children are very busy with

school work and services once school begins and need both parents' help and supervision with their activities.

For its part, the Service Agency was required by its POS Guideline for OHR Services to calculate the appropriate number of daily hours of OHR based on claimant's individual needs and by taking into account the amount of time that claimant attends school or a day program, after-school care, social and recreational program, and hours of sleep. The Service Agency presented no evidence of such calculation. The Service Agency did not show that claimant attends school in August or has after-school care or social and recreational activities that would lessen the need for OHR hours. In fact, claimant and his siblings were not in school in August 2011 due to summer break, which has a tendency in reason to show that claimant's father would need more OHR hours to provide care and supervision for claimant and her three siblings while the mother was out of the country. Moreover, the fact that the family has three children who are Service Agency consumers, two of whom have behavioral issues, supports claimant's assertion that he needs more OHR hours. As such, based on the claimant's needs and the fact that he was not in school in August 2011 when his mother goes out of the country, claimant's OHR hours will be increased by two hours per day to 14 hours per day for 21 days, or 294 hours.

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Wherefore, the Administrative Law Judge makes the following Order:

ORDER

The appeal of claimant Kevin H. of the determination of the Eastern Los Angeles Regional Center to provide 252 hours of in-home respite in lieu of out-of-home respite is granted, in part. Eastern Los Angeles Regional Center shall provide claimant with 294 hours of in-home respite in lieu of out-of-home respite for the month of August 2011 provided that claimant' submits documentary proof that his mother traveled out of the country during that time period.

Dated: September 9, 2011

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision and both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.